IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number 93-10136
WILLIAM C. JONES, JR.	)	
	)	
Debtor	)	
	)	
	)	
WILLIAM CLINTON JONES, JR.	)	FILED
	)	at 4 O'clock & 11 min. P.M.
Plaintiff	)	Date: 12-27-93
	)	
vs.	)	Adversary Proceeding
	)	Number 93-1007
BANKERS FIRST SAVINGS AND LOAN ASSOCIATION, N/K/A BANKERS FIRST SAVINGS, FSB	)	
	)	
Defendant	)	

ORDER

Debtor William C. Jones, Jr. ("plaintiff") brought this adversary proceeding against Bankers First Federal Savings and Loan Association, n/k/a Bankers First Savings Bank, FSB ("defendant" or "Bankers First") following the foreclosure and sale of his residence by Bankers First. Plaintiff asserts both a state law claim for wrongful foreclosure and a federal claim for a fraudulent transfer pursuant to 11 U.S.C. § 548(a)(2). The matter having been tried and based upon the evidence presented, the arguments and briefs of counsel, and applicable authorities, I enter the following order for the plaintiff on the state law wrongful foreclosure claim.

Plaintiff was a pipefitter for 28 years, employed for a significant portion of that time in construction, at the Georgia Power Company electrical generation plant Vogle. In 1988, he began construction of a house on a 2.01 acre tract located at 5191 Mill Branch Road, Grovetown, Georgia. Plaintiff designed the house and did most of the plumbing, electrical, heat and air conditioning work. He and wife Bonnie Sue Jones ("Ms. Jones") occupied the home in 1989. At about the same time, Plant Vogle was completed and plaintiff changed employer, working for another contractor for about nine months before going into business for himself for three years. Plaintiff suffered a substantial drop in income after leaving Plant Vogle.

On July 3, 1990, plaintiff placed a first mortgage on the Mill Branch Road property in favor of Centerbank Mortgage Company ("Centerbank") in the amount of $80,000.00. Monthly payments on the note were approximately $970.00. A month later on August 3, 1990 a second mortgage was placed on the property in the amount of $25,000.00 in favor of Bankers First in order to secure a H.O.M.E. Line Credit Account Agreement and Promissory Note ("the Note"). Under the terms of the Note, payments were to be made on the fifteenth of each month beginning in September 1990. A late charge could be assessed on any payment that was past due for 15 days.

Almost immediately, plaintiff fell behind on his second mortgage payments, however Bankers First consistently accepted the late payments until August 1992 when it referred the matter to its

attorneys. On August 20, 1992, Bankers First's attorneys sent plaintiff a notice of default and right to cure, giving him ten days to cure the default by payment of the past due installments in the amount of $1,386.09, plus late charges of $202.60 and attorney fees of $100.00 for a total amount of $1,688.69. The notice provided that failure to cure such default could result in acceleration of the debt and foreclosure and sale of the property. Plaintiff's June, July, and August payments were then past due. Payment was made on August 26, 1992, curing the default.[1]

As of August 20, 1992 the date of the first default notice, of the twenty-four payments which had come due plaintiff had made payments on 19 occasions, equalling 21 scheduled payments. Three scheduled monthly payments were made on one occasion at a time when three payments were then past due. Every payment was made and accepted when the scheduled payment was past due.[2] According to

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[1]Although Ms. Jones testified that she could not remember the amount paid, a compilation of the dates of payment made by Mr. William E. Linck, Jr., Vice President of Bankers First's Investment Recovery Department corroborates full payment as it lists the 6-15-92, 7-15-92, and 8-15-92 scheduled payments as made on August 26, 1992.

[2]Mr. Linck testified that as of foreclosure, twenty-eight payments had come due and that eighteen of the payments were late. This testimony conflicts with his compilation of payment dates which establishes that as of August 20, 1992, every payment made by plaintiff (19) had been past due when accepted. This discrepancy is due to a difference between Mr. Linck's definition of late payment which he defines to include only those payment accepted which were
past due for 15 days and subject to a late charge and the Note's definition of any payment not made on the due date as "past due." The Note provides that the borrower is in default under the

the compiled payment history, on one occasion plaintiff paid three past due installments at one time, on two occasions plaintiff paid a single monthly installment when three monthly payments were past due, and on 7 occasions plaintiff paid a single monthly installment when two monthly payments were past due. Plaintiff was aware of his financial situation and recognized the need to sell his house. In late October 1992 plaintiff was hospitalized. After he was released in November 1992, he listed the house for sale with Meybohm Realty at $166,500.00 in an effort to clear $50,000.00 from the sale.

Plaintiff failed to make any mortgage payments after August 1992 and on November 16, 1992 Bankers First's attorneys by lettergram sent a notice of default and right to cure. On that date, plaintiff's September, October, and November payments were past due. The letter provided that plaintiff could cure his breach by paying the past due installments in the amount of $1,245.87 plus late charges of $241.11 and attorney fees of $100.00 for the total amount of $1,586.98 and that failure to cure could result in acceleration of the debt and foreclosure and sale of the property. The lettergram also notified plaintiff of his right to reinstate the loan after acceleration as provided in the Security Deed.[3]

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agreement if he or she fails to make a required payment on the account when due. Default is not conditioned upon whether a payment is subject to a late charge.

[3]Paragraph 18 of the Security Deed provides:

> **Borrower's Right to Reinstate.** Notwithstanding Lender's acceleration of the sums secured by this Deed due to

Plaintiff testified that upon receipt of the notice he discussed the situation with his wife. Although they were aware of the need to make the demanded payments in order to prevent foreclosure, no payment was made within the 10 day period set in the notice. As a result of the failure to pay, on December 4, 1992 Bankers First's attorneys sent to plaintiff, by regular and certified mail, a notice of foreclosure sale, including notice of the acceleration of the outstanding balance of principal and

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> Borrower's breach, Borrower shall have the right to have any proceedings begun by Lender to enforce this Deed discontinued at any time prior to the earlier to occur of (i) the fifth day before sale of the Property pursuant to power of sale contained in this Deed or (ii) entry of a judgment enforcing this Deed if: (a) Borrower pays Lender all sums which would be then due under this Deed and the Note had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Deed; (c) Borrower pays all reasonable expenses incurred by Lender in enforcing the covenants and agreements of Borrower contained in this Deed, and in enforcing Lender's remedies as provided in paragraph 17 hereof, including, but not limited to, reasonable attorney's fees; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Deed, Lender's interest in the Property and Borrower's obligation to pay the sums secured by this Deed shall continue unimpaired. Upon such payment and cure by Borrower, this Deed and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred.

interest on his loan and making demand for the immediate payment of the total balance. The notice stated that a foreclosure sale would be conducted on January 5, 1993 and contained a copy of the legal notice of foreclosure sale which was published in the appropriate legal organ on December 9, 16, 23, and 30, 1992.

Both Mr. and Ms. Jones testified that they never saw the December 4 notice of foreclosure. It is undisputed that the certified mail copy of the notice was returned unclaimed. The regular mail notice was not returned. On December 10, 1992 Ms. Jones made a partial payment to Bankers First in the amount of $972.92 which Bankers First applied to the outstanding indebtedness. On December 19, 1992 Bankers First sent plaintiff a regular computer generated monthly account statement showing a credit of the $972.92 payment to plaintiff's account. The statement provided that the regular January payment was $463.11, that there was a past due balance of $752.13, plus late charges of $264.88, making a total payment of $1,480.12 due January 15, 1993.

At the time plaintiff received the November 16 Bankers First notice, he was also behind on the Centerbank first mortgage. To catch up the arrearage, plaintiff borrowed money and on December 31, 1992, after receipt of the Bankers First December 19 statement, made a payment to Centerbank in the amount of $2,917.14. Plaintiff testified he would not have made the payment to Centerbank if he had known Bankers First was going to foreclose.

On January 5, 1993, Bankers First sold plaintiff's home at

the scheduled foreclosure sale to real estate brokers Gary Waters and Stan White for the sum of $23,976.00, subject to the Centerbank first mortgage with an approximate balance of $79,000.00,[4] bringing the effective sale price to approximately $103,000.00.[5] Although there were several prospective bidders at the sale, only two bids were made on the property - an initial bid by the attorney for Bankers First and Mr. White's bid of $1.00 more.

At no time from the November 16, 1992 default and cure letter to plaintiff through the date of the foreclosure sale was there any verbal communication between the Joneses and Bankers First. Mr. and Ms. Jones testified they first learned that their home was foreclosed from their real estate agent. The loan officer on the account at Bankers First was unaware of the foreclosure until Mr. and Ms. Jones contacted her on January 14, 1993. Bankers First and the Joneses had no further contact after the foreclosure sale.

Mr. Linck and Ms. Shirley Richards, Assistant Manager in Bankers First's collection department testified. A "collection card" which contains handwritten notes taken by Mr. Linck and Ms. Richards concerning plaintiff's account was also introduced into evidence. Prior to November 16, 1992, Bankers First made continuing

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[4]Centerbank filed a proof of claim in plaintiff's chapter 13 case, stipulated to by the parties, listing a net principal balance owed at the time the case was filed, January 28, 1993, of $78,796.85.

[5]In its post-hearing brief, Bankers First calculates the effective sales price as $103,493.00 based on its review of the terms of the Centerbank note and an option to purchase agreement entered into by Ms. Jones after the foreclosure sale.

attempts to collect payments by contacting plaintiff when a payment was late. The collection card shows numerous telephone calls, messages, and letters to plaintiff. However, no notice was sent specifically advising plaintiff that Bankers First was demanding strict adherence to the payment terms. The computer generated monthly account statement did not provide such a notice. It only listed the late charges and any payment due on the account. Paragraph 5 of the Note provides:

> **Statements.** At monthly intervals determined by the lender ("Billing Cycles"), the Lender will send me a statement (the "Periodic Statement") which will show activity in my account during the previous month including the amount of any Advances, FINANCE CHARGE, Late Charges and Other Charges, payments and credits for my Account. The Periodic Statement will also show my credit available as of the closing date, the minimum payment due and other important information.

According to Mr. Linck, when the bank teller accepted the partial payment on December 10, 1992, the teller could not have determined that plaintiff's residence was in foreclosure. Bankers First documents an account's history in its computer system. Certain "flags" can be put on an account record. If a flag shows the account is in foreclosure, the bank's normal policy is not to accept payments on that account. These flags can only be put on fixed rate accounts. If a home is in foreclosure on an adjustable rate account such as the home equity line account involved here, the account record would not reveal that fact; therefore a bank teller would be unable to determine whether or not to accept a payment on

the account.

Mr. Linck testified that he was not informed of the December 10 payment when it was received because there was no flag on the account and that he became aware of the payment about a week later. Ms. Richards, however, stated that she informed Mr. Linck of the payment on December 10 and that he advised her to proceed with the foreclosure. Her testimony is corroborated by an entry on the collection card dated December 10, 1992, the same day as Ms. Jones payment, stating "con't foreclosure per Bill."

As to the monthly account statement which plaintiff received from Bankers First on December 19, 1992, Mr. Linck testified that Bankers First lacks procedures to prevent such a statement from being issued even when the account was being foreclosed. Nothing contained in the Note referenced above gave any indication that plaintiff could not and should not rely upon the contents of the monthly statement when a previous foreclosure notice had issued. Nevertheless, no effort was made to contact plaintiff to inform him that foreclosure was going forward after acceptance of his payment even though Bankers First's officers charged with responsibility for foreclosing this account knew that a monthly account statement would subsequently issue in the form and content as issued in this case.

Prior to foreclosure Bankers First did not obtain a new appraisal on the property, contact Centerbank, or calculate the ratio of debt to value. Mr. Linck explained that Bankers First had

its own appraisal of the property on file from the 1990 closing and was aware that the approximate balance on the Centerbank mortgage was $79,000.00. Mr. Linck stated that the ratio of debt to value was not a factor in a decision to foreclose unless the customer contacts them to arrange a workout. Mr. Linck stated that he would have worked with plaintiff if plaintiff had contacted him.

Subsequent to the foreclosure sale, plaintiff received a letter dated January 12, 1993 from the attorneys for the foreclosure sale purchasers demanding that plaintiff vacate the residence. On January 18, 1993 plaintiff was served with a dispossessory warrant. Dispossession was averted due to an arrangement entered into on January 30, 1993 between Ms. Jones and the purchasers whereby Ms. Jones received an option to purchase the subject property for a period of six months for the amount paid by Mr. White and Mr. Waters at the foreclosure sale, plus approximately $5,000.00.[6] Under the

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[6]The agreement set the purchase price in the amount equal to and payable as follows:

> A. Assumption of the outstanding balance owed at closing to Centerbank Mortgage Corporation, its successors and assignees, and
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> B. Payment of a base amount equal to Twenty-nine thousand and no/100 dollars ($29,000.00), however said base amount shall increase at the rate of One (1%) percent per month and is payable in full at closing. (For example the option is exercised and closed in month three (3), May 1, 1993, the cash payment due at closing shall equal $29,000.00 x 3% or $29,870.00), and
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> C. Payment of the monthly [first]

agreement, Mr. White and Mr. Waters were given the exclusive right to list the property for sale. Ms. Jones had a forty-five day period to exercise the option prior to any sale. On January 28, 1993, prior to the date of option agreement Mr. Jones had filed his present chapter 13 case. Even though he was not a party to the option agreement, it was stipulated at trial that he did not deny he was a beneficiary of said agreement.

On April 18, 1993, an offer on the property was presented to Mr. White and Mr. Waters for the sum of $125,000.00. The offer was referred to Ms. Jones who rejected it and made a counter offer of $164,900.00. This counter offer was rejected. On July 13, 1993, Ms. Jones exercised the option for the total cost of $31,912.00, with $30,595.00 going to Mr. White and Mr. Waters and the rest to pay transfer tax and attorney fees. The property was then sold by Ms. Jones to Hugh and Katherine Parrish for a sales price of $149,000.00. As evidenced by a copy of the closing statement, Ms. Jones received $55,716.51 in cash, after deducting $13,720.90 in settlement charges, $79,740.99 payoff of the first mortgage, and $771.60 in county taxes. Ms. Jones testified that she thought the price was too low, but that she needed to sell.

Apart from that already presented, the evidence relevant

> mortgage payment, plus any reasonable charges incurred to the holder of said mortgage. Said payment shall be paid through the Sellers and are to include the payments due January, February, March, April, May, June and July 1993.

to valuation of the property as provided in the form of stipulated appraisals and testimony is as follows. Centerbank's appraisal dated May 8, 1990 values the property at $173,500.00. Bankers First's appraisal dated July 19, 1990 values the property at $160,000.00. The Columbia County Tax Assessor's Office appraised the property in August 1992 at $162,734.00. Mr. Stan White, a real estate broker and licensed appraiser in residential real estate, purchased the property at the foreclosure sale for an effective price of approximately $103,000.00. He testified that he often purchased properties at foreclosure with the intention of re-selling them within ninety days. It was his opinion that he could obtain from $140,000.00 to $145,000.00 in a "quick sale" of the property. On June 24, 1993, Mr. Kris Hardy appraised the property at $155,000.00 for the Mortgage Place which provided financing for purchasers Hugh and Katherine Parrish.

During the six month option period, the property was initially listed for sale at $164,900.00, but reduced to $154,900.00 at some point during the last few months of the option. The property was sold to Hugh and Katherine Parrish for $149,000.00. From the evidence presented I find that on the foreclosure date the property had a fair market value of $150,000.00.

Wrongful Foreclosure

Plaintiff asserts a state law claim for wrongful foreclosure. Three different theories are advanced in support of that claim. Under his first theory, plaintiff alleges that the

conduct of Bankers First violated its duty to exercise its power of sale in good faith. Official Code of Georgia Annotated ("O.C.G.A.") § 23-2-114 provides, in pertinent part:

> Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place, and manner of sale shall be that pointed out for public sales. . . .

Plaintiff contends that the following actions by Bankers First demonstrate bad faith and a complete disregard for the consequences of its actions: (1) making the decision to foreclose while plaintiff was in the hospital; (2) failing to obtain a new appraisal on the property or calculate the ratio of debt to value before foreclosing; (3) failure to inform the loan officer of the decision to foreclose; (4) failure to implement a system to prevent a monthly account statement from being issued when a home is in foreclosure; and (5) failure to inform plaintiff of Bankers First's continued intention to foreclose after accepting plaintiff's December 10 partial payment with knowledge that plaintiff's monthly account statement would subsequently issue.

The complained of conduct is not actionable under O.C.G.A. § 23-2-114. This code section permits recovery for a sale under power "only when the price realized is grossly inadequate and the sale is accompanied by either fraud, mistake, misapprehension, surprise or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of

price." Giordano v. Stubbs. 228 Ga. 75, 79-80, 184 S.E.2d 165, 168-69 (1971) cert. denied, 405 U.S. 908, 92 S.Ct. 960 (1972). The conduct referred to by plaintiff is not the type covered by this section.

O.C.G.A. § 23-2-114 assures that the manner of the sale is conducted according to the terms of the applicable deed.

> In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale. The foreclosing party is not an insurer of the results of his exercise of the power of sale; his only obligation is to sell according to the terms of the deed and in good faith and to obtain the amount produced by such a sale. If the manner in which the sale was conducted is otherwise unobjectionable, the mere fact that, in the debtor's opinion, it brought an inadequate price does not demonstrate that the power was exercised other than in good faith.

Kennedy v. Gwinnett Commercial Bank, 155 Ga. App. 327, 330-31, 270 S.E.2d 867, 872 (1980). In this case, plaintiff does not allege any improprieties in the conduct of the sale. Bankers First's attorneys properly advertised the sale according to state law and complied with all the terms of the Security Deed and Note regarding notice of default and acceleration.[7] See Kennedy, 155 Ga. App. at 332,

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[7]Even though plaintiff contends he never received the December 4 notice of foreclosure, Bankers First's attorneys' action in sending the notice by certified mail to plaintiff's residence at Mill Branch Road is sufficient under the Security Deed, even if not claimed. Paragraph 12 of the Security Deed provides, in pertinent part:

> **Notice**. Except for any notice required under applicable law to be given in another manner, (a) any notice to

270 S.E.2d at 873 (parties entitled to only that notice required by state law and terms of the Deed). In addition, Bankers First's failure to calculate plaintiff's equity in the property, its failure to obtain a new appraisal of the property, or its institution of the foreclosure process just after the debtor was released from the hospital are not such circumstances which would contribute to bringing about a grossly inadequate price at foreclosure. Plaintiff's allegations concerning Bankers First's acceptance of his partial payment and subsequent issuance of a monthly account statement prior to foreclosure are more properly considered under his theories of mutual departure discussed infra.

In his second theory, plaintiff contends that Bankers First's foreclosure was wrongful because there was a mutual departure from the terms and conditions of the Note and Security Deed prior to acceleration and that he was entitled to reasonable notice that Bankers First intended to return to the strict terms of their agreement before it could lawfully accelerate the debt. A wrongful foreclosure claim is actionable based on O.C.G.A § 13-4-4, which provides:

> Borrower provided for in this Deed shall be given by delivering it or by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein . . . . Any notice provided for in this Deed shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

> Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given to the other of intention to rely on the exact terms of the agreement. The contract will be suspended by the departure until such notice.[8]

It is a general proposition that evidence of acceptance by a creditor of repeated, late, irregular payments from a debtor creates a factual dispute as to whether a "quasi-new" agreement has been created under O.C.G.A. § 13-4-4. Lewis v. Citizens and Southern National Bank, 174 Ga. App. 847, 848, 332 S.E.2d 11, 12 (1985); Adamson v. Trust Co. Bank, 155 Ga. App. 646, 647, 271 S.E.2d 899, 900 (1980); Smith V. General Financial Corp. of Georgia, 243 Ga. 500, 501, 255 S.E.2d 14, 15 (1979). The evidence clearly establishes that Bankers First consistently accepted late payments by plaintiff on his account. Up until the August 20, 1992 notice of default, every payment accepted by Bankers First was "past due." Bankers First, however, did not simply acquiesce in payment beyond the due date. It imposed late payment charges and attempted to collect payments by telephone and letter. Bankers First's conduct negates a finding that the parties, preacceleration, intended a mutual departure from the terms of their agreement. Carter v.

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[8]The last sentence of this section differs from the last sentence of the former 1933 Code version [Code Ann §20-116] which provided, "Until such notice, the departure is a quasi new agreement." Nevertheless, the cases under O.C.G.A. § 13-4-4 still use the "quasi new agreement" language and no reported decision makes a distinction in analysis based on this Code change.

General Finance and Thrift Corp., 96 Ga. App. 423, 100 S.E.2d 99 (1957) (42 attempted contacts regarding payment); Crawford v. First National Bank of Rome, 137 Ga. App. 294, 223 S.E.2d 488 (1976) (advising debtor payment due and exacting late charges); Duncan v. Lagunas, 253 Ga. 61, 316 S.E.2d 747 (1984) (oral expressions of displeasure at late payments).

In determining whether a mutual departure from the terms of the contract occurred all of the events preceding the alleged wrongful acceleration and foreclosure must be considered. Adamson, supra, 155 Ga. App. at --; 271 S.E.2d at 901. Bankers First's August referral of the account to its attorneys and the subsequent default notice sent to plaintiff demonstrated its reliance on its legal remedies as set forth in the terms of the Note and Security Deed as to any default by plaintiff with regard to the date of payment. Both the August and November default notice letters stated that the failure to cure the default by paying the amount demanded could result in acceleration and foreclosure. At trial plaintiff testified that after receipt of the November 16 notice, he told his wife that they had to make some kind of arrangements to get the account caught up because it was close to being foreclosed on. Plaintiff was aware that Bankers First was holding him to the terms of the Note and Security Deed. There was no mutual departure or quasi new agreement created by the parties conduct prior to acceleration.

Under his third theory, plaintiff contends that the events

subsequent to acceleration established a "mutual departure" from the term of the loan and reinstated the loan; therefore Bankers First had no right to foreclose. Plaintiff contends that the loan was reinstated either by Bankers First's acceptance of the December 10 payment or by that acceptance and the subsequent issuance of the regular monthly account statement on December 19, 1992.

Georgia law is clear that acceptance of a partial payment after acceleration does not waive the default or decelerate the debt. Adamson, supra, 155 Ga. App. at 648, 271 S.E.2d at 901; Chapman v. Nation, 193 Ga. App. 632, 634, 388 S.E.2d 744, 746 (1989); Philyaw v. Fulton National Bank, 139 Ga. App. 28, 30, 227 S.E.2d 811, 812 (1976).

> Where the election to accelerate is declared prior to the tender of arrearage, the rights of the parties are the same as if the entire note had by its terms become due immediately upon default. The entire debt being due, the mere acceptance of part-payment thereon does not amount to a waiver of the prior default or undo the maturity of the remainder of the indebtedness, nor set it forward to the date originally fixed under the terms of the original contract.

Philyaw, 139 Ga. App. at 30, 227 S.E.2d at 812. These cases however do not address plaintiff's right to reinstate the account after acceleration at any time prior to five days before the foreclosure sale upon payment of all sums which would have been due had no acceleration occurred plus any attorney fees and expenses incurred by the bank in conjunction with its acceleration and institution of foreclosure. See note 3 supra. Plaintiff's payment of $972.92 was

insufficient to reinstate the loan under the Security Deed provision, as that would have required payment, at a minimum, of the amount set out in the November 16 cure notice, $1,586.98. The issue is whether the partial payment effectively reinstated the loan under O.C.G.A. § 13-4-4.

The only Georgia case involving an acceptance of a partial payment after acceleration coupled with an agreement to reinstate a loan for a payment of less than the full indebtedness is Curl v. Federal Savings and Loan Association of Gainesville, 241 Ga. 29, 244 S.E.2d 812 (1978). In Curl, the creditor had accepted late and irregular payments from the debtor for several years. No notice was given by the creditor of its intent to insist on strict compliance prior to a letter by which the creditor accelerated the debt. The acceleration letter also offered to reinstate the loan upon payment of $260.79 plus a $25.00 late charge. The debtor paid a lesser amount, $210.00, which the creditor accepted. The creditor then foreclosed. The trial court granted summary judgment for the creditor. On appeal, the debtor established that the lender had accepted similar payments and reinstated the loan on prior occasions, and contended that this created a quasi new agreement to work out defaults without foreclosure. The Georgia Supreme Court reversed the grant of summary judgment holding that triable issues of fact existed. Curl, 241 Ga. at 30, 244 S.E.2d at 813. On remand, a jury verdict was rendered for the debtor. Nevertheless, because of the small size of the verdict, the debtor appealed the

judge's failure to enter a directed verdict in her favor. Revisiting the case, the Georgia Supreme Court held that the facts did not warrant a directed verdict for the debtor. Curl, 243 Ga. 842, 844, 257 S.E.2d 264, 265 (1979).

Plaintiff argues that the facts in this case are essentially the same as those in Curl and that as the supreme court found those facts sufficient to authorize an award for wrongful foreclosure, Curl requires the same result here. I disagree. Curl establishes that acceptance of a partial payment after acceleration can in certain circumstances constitute a waiver of default when the payment was made pursuant to a right to reinstate upon payment of less than the full indebtedness. Curl provides that in those situations whether a waiver of the default has occurred must be determined without reference to the fact of acceleration.

While acceptance of the partial payment alone does not establish a mutual departure and waiver of default, the overall conduct of the parties must be considered in determining whether a waiver of the contract provisions occurred and a quasi new agreement was affected.

> The provisions of a written contract may be waived by acts or conduct which justify the other party to believe the express provisions are waived, and even a contractual provision against waiver may be waived by conduct.

Crawford, 137 Ga. App. at 295, 223 S.E.2d at 490. See also New York Underwriter Insurance Co. v. Noles, 101 Ga. App. 922, 115 S.E.2d 474 (1960) (waiver inferred by conduct inconsistent with an intention to

enforce strict compliance with a contract condition).

Bankers First had previously accepted late, irregular, and similar partial payments. On 2 different occasions plaintiff paid a single monthly installment when three monthly payments were past due. On 7 different occasions plaintiff paid a single monthly installment when two monthly payments were past due. As shown by the bank's compilation of payments made, the $972.92 payment of December 10 satisfied two of the three monthly payments then due.

In this case, the partial payment of December 10 was made after notices of default and acceleration had been sent to plaintiff. While plaintiff might have considered Bankers First's acceptance of the August payment after notice of default as evidence that it was willing to work with plaintiff even after the bank had referred the matter to its attorneys, the August payment was apparently a total cure of the default. Thus, plaintiff was not justified in believing that Bankers First had agreed to waive the default based solely on the bank's acceptance of the partial payment after he had received a notice of default and was aware of the possibility of foreclosure.

Bankers First, however, did more than simply accept the partial payment. It also issued a monthly account statement to debtor which showed a credit of the partial payment, with next payment due on the regularly scheduled payment date, January 15, 1992, a date subsequent to the date of the scheduled foreclosure sale. By breaking down the payment due into the regularly scheduled

payment amount due, the amount past due, and late charges, and by establishing the date on which such payment would be required, the statement effectively provides for a new and distinct agreement regarding payment complete in its terms. See Morrison v. Roberts, 195 Ga. 45, 23 S.E.2d 164, 165 (1942). The statement is clear; plaintiff's default can be cured by payment of the stated amount on the due date. Plaintiff's reliance on this statement is demonstrated by his testimony that he would never have made the Centerbank first mortgage payment on December 31, 1992 if he had known Bankers First was going to foreclose.[9] Bankers First's acceptance of plaintiff's December 10 partial payment and subsequent issuance of plaintiff's regular monthly account statement on December 19 had the propensity to mislead and lull plaintiff into a false sense of security so as to render it inequitable for the bank to foreclose on January 5, 1993. See Continental Casualty Co. v. Union Camp Corp., 230 Ga. 8, 13, 195 S.E.2d 417, 422 (1973).

I find that given plaintiff's right of reinstatement and Bankers First's history of accepting late and partial payments, Bankers First's acceptance of plaintiff's post-acceleration partial payment and subsequent issuance of the post-acceleration monthly account statement are inconsistent with an intent to require

[9]The amount of the payment made to Centerbank $2,917.14, apparently would have been sufficient to reinstate the Bankers First loan pursuant to the terms of the Security Deed. The reinstatement amount would have been $1,586.98 plus any attorney fees and expenses resulting from the acceleration and institution of foreclosure
proceedings and could have been made up to December 31.

compliance with the exact terms of the Note and Security Deed. The conduct of the parties establishes a "mutual departure" from the terms of the contract and constitutes a waiver by Bankers First of the plaintiff's prior defaults. Therefore, as the loan was not in default and the contract was suspended on the date of foreclosure, the bank's foreclosure was wrongful. O.C.G.A. § 13-4-4.

Bankers First is in error in its contention that its acceleration and foreclosure was not wrongful because it had previously tolerated only late payment and not non-payment. See, e.g., Newby v. Bank of Pinehurst, 159 Ga. App. 890, 285 S.E.2d 605 (1981); Booth v. Gwinnett Federal Savings and Loan Association, 200 Ga. App. 60, 406 S.E.2d 568 (1991) (acceleration not wrongful when based on non-payment and tolerated departure was only to late payment). Based on my review of the payment schedule as previously outlined, I find that, contrary to Bankers First's assertions, it had tolerated non-payment of monthly installments and overlooked a default based on a single monthly payment which was not sufficient to cure the default then existing. The line of cases cited by Bankers First is not controlling here.

Plaintiff seeks to recover the following damages under his wrongful foreclosure claim: (a) special damages in the amount of $60,000.00 for the loss value of his home; (b) general damages in an amount to be determined by the court for loss of credit standing, loss of community reputation and mental pain and aggravation; (c) punitive damages to be decided by the court; and (d) attorney fees

including all costs of litigation as a result of defendant's bad faith.

Wrongful foreclosure is a tort in Georgia and can give rise to damages for loss of equity, general damages such as those listed in plaintiff's complaint and punitive damages. Curl, 243 Ga. 842, 257 S.E.2d 264 (1979). The wrongful foreclosure here resulted in the sale of this property with a value of $150,000.00 for an effective price of $103,000.00. The plaintiff benefitted from the exercise of the option agreement by Ms. Jones resulting in a recovery of the property and sale for $149,000.00. As a result of the option plaintiff effectively recovered all but $1,000.00 of the value of the property. The measure of damage is the difference in value, $1,000.00, plus the cost of the option agreement, $5,000.00, totalling $6,000.00. With regard to plaintiff's claim for general damages, the only evidence presented of damages suffered as a result of the foreclosure itself was through Ms. Jones testimony. She was embarrassed and humiliated when she learned of the foreclosure and hung sheets over the windows because she felt threatened. Ms. Jones also testified that the foreclosure caused marital problems. The evidence is insufficient to establish any basis for recovery for damages beyond the $6,000.00 set forth above.

Plaintiff is not entitled to punitive damages or attorney fees in this case. Punitive damages are available only under O.C.G.A. § 51-12-5.1, in cases where

> it is proven by clear and convincing evidence that the defendant's actions showed willful

> misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

Plaintiff argues that Bankers First's foreclosure satisfies that standard because it accepted the partial payment on December 10 with knowledge that a monthly statement would be issued showing a credit of that payment. I do not find this clear and convincing evidence of the type of conduct required under the statute. The issuance of the statement was not done with intent to injure the plaintiff. The testimony established that the issuance of such a monthly account statement would be triggered by a payment made by any debtor. I find the bank's actions giving rise to the complained of loss as merely negligent. Attorney fees may be awarded in certain tort cases as "additional damages" under O.C.G.A. § 51-12-5, which provides:

> In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

While it is a general rule that attorney fees are not permitted as an item of damages except in those cases permitted by statute, Dodd v. Slater, 101 Ga. App. 358, 114 S.E.2d 167 (1960), a very limited exception is made where the tort is intentional and rights of another are willfully violated. Piedmont Cotton Mills, Inc. v. H.W. Ivey Construction Co., 109 Ga. App. 876, 881, 137 S.E.2d 528, 532 (1964). Nevertheless, this exception is not applicable here. As

previously stated, I find Bankers First's acts negligent, but not intentional. No award of attorney fees is warranted.

Fraudulent Transfer

Plaintiff also alleges that the foreclosure on his property for a sale price of $102,000.00 when the property was worth over $162,000.00 on the date of sale constitutes a fraudulent transfer under 11 U.S.C. § 548(a)(2) as the sale did not bring the property's "reasonably equivalent value" under 11 U.S.C. § 548(a)(2)(A).[10] Plaintiff seeks recovery from Bankers First of $60,000.00, the alleged equity in the house prior to the foreclosure sale.[11]

> Section 548(a) provides, in pertinent part
>
> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily- -

[10]The complaint does not cite any Bankruptcy Code section pursuant to which plaintiff is seeking recovery, however, as the complaint alleges all the essential elements for a fraudulent transfer under § 548(a)(2), I will assume that this section applies.

[11]Previously, the bank had objected to plaintiff's standing as a chapter 13 debtor to utilize the § 548 avoidance powers. I ruled that plaintiff had standing to prosecute his complaint pursuant to § 522(h), which allows a debtor to utilize § 548 avoidance powers to the extent he or she seeks to recover exempt property. In this case, plaintiff had legally exempted the entire claimed value of his residence, $162,000.00 as no party in interest timely objected to the claimed exemption. See In re William C. Jones, Jr., Chapter 13 Case No. 93-10136, Adv. Proc. No. 93-1007, slip op. (Bankr. S.D. Ga. July 20, 1993).

> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; . . .

Under § 548(a)(2), plaintiff has the burden of proving each of the following elements to avoid a transfer as fraudulent:

> (1) A transfer of an interest of the debtor in property;
> (2) In which the debtor receives less than reasonably equivalent value;
> (3) At a time when debtor was insolvent or was made insolvent thereby; and
> (4) Made within one year of filing bankruptcy.

In re Rodriquez, 895 F.2d 725, 726 n.1 (11th Cir. 1990).

A foreclosure constitutes a transfer by the debtor occurring at the time of the foreclosure sale. In re Littleton, 888 F.2d 90, 93 n.6 (11th Cir. 1989). As the foreclosure sale occurred on January 5, 1993 and plaintiff filed bankruptcy on January 28, 1993, the complained of transfer occurred within one year of filing. Remaining for determination is whether the foreclosure sale price was for less than reasonably equivalent value and plaintiff's insolvency.

At trial, plaintiff presented no evidence as to his insolvency on the date of the transfer. In closing, however, plaintiff argued that the bankruptcy schedules in the underlying case would prove his insolvency on the date in question and requested that I take judicial notice of those schedules. A court may take judicial notice of the file in the underlying case and I do

so in this case. See In re Carey, Chapter 7 Case No. 91-10130, Adv. Proc. No. 91-1065, slip. op. at 5 n.4 (Bankr. S.D. Ga. May 14, 1992); In re Hatcher, Chapter 13 Case No. 89-10834 (Bankr. S.D. Ga. March 14, 1990).

In order to meet the insolvency requirement under § 548(a)(2)(B)(i), plaintiff's liabilities must exceed his assets, at fair valuation, exclusive of his allowable § 522 exemptions, on the date of foreclosure or as a result of the sale.[12] Plaintiff's schedules filed on January 28, 1993 show that as of that date plaintiff had assets worth $175,300.00 and claimed exemptions of $175,625.00, leaving him no non-exempt assets.[13] As to plaintiff's

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[12]11 U.S.C. § 101(32), in pertinent part, defines "insolvent" to mean -

> (A) with reference to an entity other than a partnership, and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of-
>
> (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under section 522 of this title;

[13]The schedules show debtor exempting all his listed assets, including the total value of his residence, with the exception of $200.00 in wearing apparel. The discrepancy in amount between his assets and his exempted assets results from plaintiff incorrectly totalling the value of his automobiles on personal property schedule B at $6,600.00 when the correct total is $6,100.00. On his claimed exemptions, plaintiff exempts $6,600.00 in automobiles. The remaining $25.00 discrepancy arises from debtor listing the value of certain firearms at $1,450.00 in his personal property

liabilities, the proofs of claim filed in the case in conjunction with the schedules show debts of $118,403.62. Plaintiff's Statement of Financial Affairs shows one payment of $3,000.00 made to plaintiff's brother and one donation to the Rescue Mission of $900.00 as the only property transfers made by plaintiff within one year of filing which might have occurred during the period between January 5, 1993 and January 28, 1993. From the schedules, none of the debts were incurred between January 5, 1993 and the date of filing. I find that plaintiff was insolvent under 11 U.S.C. § 548(a)(2)(B)(i) as of the date of foreclosure, January 5, 1993.

In determining whether plaintiff received a "reasonably equivalent value" as a result of the foreclosure sale, In re Grissom, 955 F.2d 1440 (11th Cir. 1992) establishes the guidelines to be followed. Prior to Grissom the Eleventh Circuit Court of Appeals had rejected the Durrett rule which, as interpreted, provided that a foreclosure sale for less than 70% of the fair market value of the property is a sale for less than a "reasonably equivalent value." Littleton, supra at 93 (discussing Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980)). The Durrett 70% test was only to be used as a guideline and a determination of reasonable equivalence was to be based on all the facts and circumstances of each case. Id. In Grissom, the court extended its analysis of the "reasonable equivalence test" it had initially set forth in Littleton. Grissom provides that if a lawful

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schedule B, but claiming an exemption in the firearms of $1,475.00.

foreclosure sale occurs, absent fraud, collusion or irregular or unlawful procedures, a presumption arises that the sale price is reasonably equivalent to the property's value. 955 F.2d at 1446. In order to rebut the presumption, the party seeking to avoid the sale must establish specific factors which undermine confidence in the reasonableness of the foreclosure sale price. Id. Factors relevant to rebutting the presumption are: (1) whether the sales price was less than 70% of the property's market value;[14] (2) whether the foreclosing party obtained a fair appraisal before the sale; (3) the extent to which the foreclosure was advertised; and (4) the competitive conditions surrounding the sale such as the number of serious bidders. Id.

Plaintiff did not dispute that the foreclosure sale was conducted in accordance with state law. Therefore, a presumption arises that the effective foreclosure sale price of $103,000.00 is reasonably equivalent to the property's value. Plaintiff has the burden of rebutting that presumption. Relevant evidence to the reasonableness of the sales price established at trial is as follows. Bankers First had an appraisal of the property on file dated July 19, 1990 valuing the property at $160,000.00 and the bank

[14]The court in Grissom made it clear that the 70% test is just one of the factors that is relevant in a reasonable equivalency determination. A foreclosure sales price of less than 70% can still be found to be a reasonably equivalent value if the court's analysis of the relevant factors so indicates. 955 F.2d at 1445. However, "[u]nder usual circumstances, establishing a violation of the Durrett 70% test is, standing alone, insufficient to make the foreclosure sale avoidable under Section 548." Id. at 1449.

did not obtain a new appraisal prior to foreclosure. The bank did not contact Centerbank the first mortgageholder to inform them of the sale. At the sale only two bids were made on the property - Bankers First's bid and Mr. White's bid of $1.00 more. The only advertisement of the sale was the ad published four times in the local newspaper as required by state law. The sale only obtained 68.67% of fair market value ($103,000.00 divided by $150,000.00).

These facts tend to bring into question whether the foreclosure sale price was reasonable. The lack of bidding on the property suggests that there was little competitiveness surrounding the sale. Additionally, Bankers First failed to advertise the property beyond the minimum required by state law. Bankers First failed to obtain a new appraisal prior to foreclosure when the bank knew from a prior appraisal that its payoff and the first mortgage balance probably left a substantial equity. This evidence rebuts the presumption created by the lawfully conducted foreclosure sale. The value of the property on the date of transfer, foreclosure, was $150,000.00. The value obtained by the sale was only $103,000.00. The equity lost was $47,000.00. Nevertheless, I read Littleton to require that I look to the effect that the option sale had on the parties in making the required reasonable equivalence determination. As stated in Littleton,

> We see no reason, however, why the court must consider only the foreclosure sale of the property in determining whether the debtor received reasonable value for his interest. Where as here, subsequent dispositions of the property provide to the parties involved only

> the value to which they are clearly entitled, it is proper for the court to consider the effect of all transfers of the property in making its determination.

888 F.2d at 94 n.7. In this case, plaintiff benefitted from the option contract exercised by his spouse and the property sold for $149,000.00, a reasonably equivalent value. No recovery is available under 11 U.S.C. § 548(a)(2).

It is therefore ORDERED that judgment is entered for Plaintiff William C. Jones, Jr. against Defendant Bankers First Savings, FSB in the amount of $6,000.00 together with future interest as provided by law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of December, 1993.